SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 127.

THE MISSOURI PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA,

AND

No. 128.

THE MISSOURI PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA, ETC.

REPLY BRIEF.

First.

The statute on its face is void, because it in terms denies to the railroad company the equal protection of the laws.

It gives the persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, a

cause of action against "any railroad company, officer, or agent thereof, who violates or evades the provisions of the act," for "all damages sustained by reason of such violation," and in addition thereto makes the company liable "for each offense to a penalty of five hundred dollars," to be recovered by the county attorney in an action brought in the name of the State, in any county in the State, etc.

Does the railroad company go into such litigation on equal terms with the person or association owning the grain elevator?

R. R. Co. *vs.* Ellis, 165 U. S., 156-163.
Connelly *vs.* Union Sewer Pipe Co., 184 U. S., 559.

Without financial or other interests in the matter, the State becomes the champion of the owners of the elevator.

The State takes up the cudgel through the county attorney and its Attorney General, and in its name compels the railway company to pay a penalty of five hundred dollars for the offense of refusing to give up its private property, without compensation, to a private association of grain dealers. In this criminal prosecution the railway company is absolutely helpless, unless it can show it has erected, equipped, and maintained the side track or switch, as demanded by the association and required by the statute.

Under this statute, as construed by the Supreme Court of Nebraska (81 Neb., 177-178), the railway company has no voice in the matter, but the owner of the elevator is the "sole and ultimate judge" as to the manner the railway company shall construct and manage its terminals.

Second.

The law under which these proceedings were instituted was passed in 1905 (Session Laws, Neb., 1905, p. 500). After these proceedings were instituted, and while they were pending, the Legislature of Nebraska amended and repealed

the law (see Session Laws, Nebraska, 1907, pp. 309-310), and added a *proviso*, which prescribes as a condition precedent to the taking or appropriation of the property of the railway company, there shall be a judicial investigation, after notice, on the petition of the person or association desiring the property, and before the property of the company can be taken or used, full and adequate compensation must first be made by the person or association making the application.

By this amendment of 1907 the legislature of Nebraska recognized that the law of 1905 was unjust in this: that it deprived the railroad company of its property without due process of law, and appropriated the same to a private use, without the consent of the company and without compensation.

Third.

It is said in the opinion of the court, in the Farmers' Elevator Case, that "It is true that there are one or more elevators at the station of Strausville, but the farmers in that vicinity do not seem willing to deal with the parties operating them, etc.," and in the brief of the Attorney General it is stated that "A combination existed in the State of Nebraska between the grain dealers and the owners of elevators, to control the price of grain, etc.," and that "The producers in the territory tributary to said village were unable to sell their products to the grain dealers in said village, at their true market value, etc.," and that the producers organized the association and "Fifty farmers in that community were stockholders of this Grain Association, who owned about 10,000 acres of land, etc."

Again it is stated that "The evidence in this record is amply sufficient to justify the assertion that prior to the time the Manley Coöperative Grain Association commenced business in Manley, a combination existed between the grain buyers operating the two elevators located on the railway

company's right of way, which enabled them to secure the grain products of that community at prices below the actual market value. When the farmer tendered the corn to these buyers, the price offered by both was the same, etc."

Therefore, it is claimed, that between the two grain buyers there was a combination and trust and that the fifty farmers were justified in forming a combination and trust of their own with which to oppose the combination and conspiracy between the two.

From the record and the admissions of counsel in their printed briefs the conclusion is irresistible that the Manley Coöperative Grain Association and the Farmers' Elevator Company are each private associations made up of a large number of farmers for the sole purpose of "cornering" the grain at the respective stations and driving out competition and that each was a combination in violation of the anti-trust acts of the State of Nebraska, and if such is the case, they have no right to do business in the State of Nebraska, and should not be heard to complain of any act of the railway company.

See Cobby's Compiled Statutes of Nebraska, 1909, sections 12001, 12027, 12028, 12037.

Respectfully submitted.

B. P. WAGGENER,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE STATE OF NEBRASKA,
No. 127 (345)

and

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE STATE OF NEBRASKA.
No. 125 (346)

SUPPLEMENTAL BRIEF.

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